Supreme Court, U.S.
FILED
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No. 061279

In The
Supreme Court of the United States

Juan Pequeno,

Petitioner,

v.

Michael B. Schmidt, Ch7 Trustee,
Law Office of Frank Costilla,
City of Brownsville, et. al.,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 5th Circuit Court of Appeals erred by dismissing Pequeno's appeal based on Debtor lacking standing to appeal, when in fact Pequeno as Ch13 debtor-in-possession appellant has standing pursuant to Title 11 U.S.C. § 323(b), and the 'law of the case' had already been ruled on, in conflict with 5th Circuit's own earlier decision with same parties, appeal#04-40573?

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OPINION BELOW

The Order of the United States Court of Appeals for the Fifth Circuit is docketed in appeal #05-41624, filed on August 31, 2006. There was no written opinion by the Fifth Circuit of Appeal. The decision of the United States District Court for the Southern District of Texas is reported in civil cause #B00-cv180. The order denying Petitioners' request for rehearing is docketed in appeal#05-41624, filed on October 12, 2006.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on August 31, 2006. On September 14, 2006, Petitioner filed a timely request for rehearing. The petition for rehearing was denied by order dated October 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article III, § 1 provides, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

STATEMENT OF THE CASE

A. Factual Background.

On December 31, 2001, Appellant, Juan Pequeño ("Pequeño."), *pro se*, filed a petition for relief under Chapter 7 of the Bankruptcy Code. Pequeno's home of 20 years had over $30,000 of equity, and Pequeno's reason for filing bankruptcy was to save Pequeno's home from foreclosure.

Pequeno had bought his home on November 1985 with Mortgagor First Union Corporation who in 1990 sold its mortgage to new mortgagor Aurora Loan Services, Inc, ("ALS"). Pequeno had been able to keep his payments current until being terminated unlawfully from his employment. ALS threatened to foreclose Pequeno's home on New Year's Day of 2002, so Pequeno filed Ch7 Bankruptcy the day before the scheduled foreclosure, to try to save his home and equity.

On January, 2002 Pequeno filed a Motion to dismiss Ch7 Bankruptcy upon recommendation by Pequeno's previous attorney Frank Costilla.

Pequeno was the owner of a cause of action #B00-cv0180 against his previous employer the City of Brownsville, which had violated Pequeno's First Amendment of the right to free speech. Pequeño had filed a Title 42 U.S.C. §1983 lawsuit on November 27, 2000 in this Federal court. The suit against the City of Brownsville was brought to trial on February 8-12, 2002 and upon the verdict of the jury for Pequeno, the Honorable Judge Hilda Tagle entered a judgment

in favor of Pequeño in the amount of $400,359 plus $20,385 in attorney's fees (the "judgment"). The judgment is dated March 26, 2002. The City of Brownsville appealed the judgment to the United States Court of Appeals for the Fifth Circuit.

On March 2002, ALS filed a Motion to Lift Stay on Pequeno's home in which ALS erroneously stated to Bankruptcy Court that Pequeno had 'no equity' in his home of over 20 years in order to lift Stay.

On April 2002, Bankruptcy Court ruled to Lift Stay on Pequeno's home and denied Pequeno's motion to drop Ch7 Bankruptcy. Subsequent to the April 2002 Bankruptcy rulings, Pequeno filed a 'Motion to Reconsider Not to Lift Stay because ALS had erroneously stated to the Bankruptcy Court that Pequeno had 'no equity' and thus ALS lacked cause to lift Stay pursuant to Title 11 U.S.C. §362(a).

On June 5, 2002, Bankruptcy Court held hearing and ruled to 'Reconsider Pequeno's Motion based on the issue that 'equity' did exist and Ordered Pequeno to file the rest of his schedules by June 17, 2002 and further Ordered to continue the hearing for 'Reconsider Not to Lift stay' until August 7, 2002. At the same hearing, Pequeno stated to Bankruptcy court that Pequeno intended to file Motion to Convert to Ch13 in order to save his home from foreclosure and to be allowed to put his home in a Ch13 plan.

On June 5, 2002, after hearing Pequeno met with Ch7 Trustee Michael Schmidt, ("Trustee Schmidt") and Pequeno's previous attorney Frank Costilla and Pequeno stated to Trustee Schmidt that Pequeno intended to file for conversion to Ch13 in

order to save his home from foreclosure and Trustee Schmidt stated hat he would oppose. Pequeno asked Trustee Schmidt why he would oppose and Trustee Schmidt stated that Pequeno had filed for Ch7 and that the case would be resolved as a Ch7, eventhough the best course to save Pequeno's home was a Ch13 conversion.

TRUSTEE SCHMIDT HIRES SELF AND PEQUENO'S FORMER ATTORNEY:

On June 10-13, 2002, Trustee Schmidt filed a motion to hired his own firm Law Offices of Michael Schmidt to assist only with the litigation of Pequeno's Judgment and also hired Pequeno's previous attorney, Frank Costilla on contingency fees base of 50% (eventhough Pequeno stated to Trustee Schmidt that Pequeno's previous attorney never had Pequeno sign a contingency contract with their Law firm) for the sole purpose of Pequeno's Judgment which was on appeal pursuant to Title 11 U.S.C. §327.

Bankruptcy Court approved both hiring's eventhough Pequeno had conflict of interest with previous attorney Frank Costilla. Trustee Schmidt now became the largest creditor and entity to personally gain from Pequeno remaining in Chapter 7.

TRUSTEE SCHMIDT NEVER INFORMS CREDITOR OF HIS INTENTION TO SETTLE JUDGMENT AND ALLOWED FOR CREDITOR TO BE DISCHARGED:

Bankruptcy docket evidences that Creditors will never informed by Trustee Schmidt that Pequeno's case was an asset case and that Trustee Schmidt intended to

settle and subsequently on August 12, 2002, creditors were discharged leaving all of Pequeno's Judgment in the hands of Trustee Schmidt, Trustee Schmidt's own firm and Pequeno's previous attorney.

Trustee Schmidt main allegation of fraud against Pequeno was that Pequeno had not stated the lawsuit in the appropriate schedule eventhough Pequeno had stated it in the Statement of Financial Affairs. Trustee Schmidt claimed that Pequeno was attempting to hide the Lawsuit Judgment eventhough Trustee Schmidt and his firm and his hired other firms were actively pursuing settlement option and determining when was the best time to execute their plan..all for personal gain and not for creditors as proven the bankruptcy docket.

PEQUENO CONVERTED TO CH13 PURSUANT TO §706(a)

On July 18, 2002, Pequeno filed a 'Motion to Convert to Ch13', Dkt#50 pursuant to Title 11 U.S.C. § 706 (a) Bankruptcy Conversion rules.

At the August 7, 2002 hearing Bankruptcy Court subsequently granted Pequeno's Ch13 conversion as shown in Bankruptcy docket and in hearing transcript of same date.

Bankruptcy further ruled that Pequeno would be given an "*opportunity to file a good Ch13 plan to pay his home of 20 years and if Pequeno was successful then in effect ALS would have a new contract.*"

This 'oral' Order was never revoked or vacated by Bankruptcy Court or objected to by Trustee Schmidt, as evidenced in Bankruptcy docket.

On September 3, 2002, Pequeno filed a Ch13 plan which complied with Bankruptcy Court's order of August 7, 2002 and included ALS arrearage of home payment and car and other payments. ALS nevertheless set new foreclosure sale of Pequeno's home for September 3, 2002 eventhough Pequeno contacted ALS and stated to ALS about Bankruptcy Court's clear intention of August 7, 2002 for allowing Pequeno to pay his home via a Ch13 plan and that ALS 'lacked cause to lift stay since ALS had misrepresented fact to the Bankruptcy Court. ALS proceeded to sell Pequeno's home on foreclosure in violation of Bankruptcy court's ruling of August 7, 2002. ALS further stated to Pequeno that in the event that foreclosure was wrong then ALS would just reverse the sale.

VIOLATION OF BANKRUPTCY CONVERSION LAW §706(a)

On September 2002, Trustee Schmidt filed a Motion requesting for authority to Mediate Pequeno's Judgment eventhough Pequeno had already been granted Ch13 conversion.

On September 2002, Trustee Schmidt also filed Motion objecting to Pequeno's claim of exemption of property eventhough Pequeno had already been granted Ch13 conversion.

On September 2002, Trustee Schmidt filed for Agreed Settlement of Pequeno's Judgment which was granted by Bankruptcy court on September 25, 2002 eventhough Pequeno had already been granted Ch13 conversion.

On September 2002, Pequeno filed objection to Bankruptcy court's Order of granting authority to Trustee Schmidt to mediate and the approval of settlement Order of September 25, 2002 both of which Bankruptcy court set hearing for October 9, 2002.

On October 9, 2002 Bankruptcy Court decided to hold a hearing on whether to deny Pequeno's Ch13 conversion of August 7, 2002 and on whether to deny Pequeno's claim of property exemption, Pequeno's objection to Trustee Schmidt's authority to mediate and Pequeno's objection to Trustee's agreed settlement. Bankruptcy court ruled for additional Briefs and took matter under advisement.

RULING BY BANKRUPTCY COURT WHICH WAS REVERSED ON APPEAL

On November 7, 2002, Bankruptcy Court docket evidences that Bankruptcy Court in violation of Title 11 U.S.C. §706(a) Bankruptcy Conversion rules, denied Pequeno's Ch13 conversion of August 7, 2002, denied Pequeno's objection to Schmidt's wrongful settlement of September 25, 2002, denied Pequeno's objection to Trustee Schmidt's wrongful authority to settle, and denied Pequeno's September 3, 2002 exemption claim of Pequeno's Judgment. The above 4 Bankruptcy Orders of November 7, 2002, were timely appealed by Pequeno on November 22, 2002.

On April 1, 2004, the Honorable Judge Andrew Hanen, pursuant to Title 11 U.S.C §706 (a) and §348 (e) Ordered that Bankruptcy did not have authority to denied Pequeno's absolute right to convert to Ch13' as of August 7, 2002, and reversed Bankruptcy Court's denial of Pequeno's Ch13 conversion and thus rendered 'moot' the Settlement Order of September 25, 2002 which was contingent on whether Pequeno was a Ch13 debtor. *See Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004)*

In the April 1, 2004, Order the Honorable Judge Andrew Hanen also found that Trustee Schmidt's claim of Pequeno's 'bad faith' were unfounded and did not rise to the level of 'extreme circumstances' and did not matter since Pequeno had an absolute right to convert pursuant to Bankruptcy conversion law.

5Th CIRCUIT AFFIRMED LOWER DISTRICT APPELLATE COURT

On March 4, 2005, the 5th Circuit Court of Appeals (In Pequeno vs Schmidt, cause#04-40573, 2005) affirmed the District Appellate ruling of Pequeno's right to Ch13 conversion as of August 7, 2002 pursuant to Bankruptcy Law.

Bankruptcy Court simply did not have authority to grant to Trustee Schmidt the right to settle any of Pequeno's property or to object to Pequeno's claim of property being exempt as of August 7, 2002, and thus the settlement Order and Orders after August 7, 2002 were 'moot' and wrongful pursuant to Title 11 U.S.C. 11 U.S.C §706 (a) and §348 (e) Bankruptcy conversion law.

REMANDED BACK TO BANKRTUPCY COURT

Bankruptcy Court held hearing on July 6, 2004 and orally stated that Pequeno was now in a Ch13 pursuant to District Appellate Court ruling of April 1, 2004.

At same hearing, Ch7 Trustee Schmidt in 'bad faith' was attempting to 'Cross Convert' Pequeno's Ch13 case to Ch7 by entering erroneous exhibits about Pequeno's Ch13 plan of September 3, 2002 and entered proffer by Ch13 attorney Ms. Hower whom Pequeno had not even talked to about Pequeno's Ch13 case.

At same hearing, Bankruptcy Court ruled to allow Pequeno to proceed with Ch13 confirmation and not to hear Ch7 Trustee Schmidt's exhibits at this time and set continuance hearing for August 4, 2004 to hear Ch7 Trustee Schmidt's Motion to Cross Convert Pequeno's Ch13 bankruptcy. As proven by the Bankruptcy docket one week later Trustee Schmidt filed these same July 6, 2004 Exhibits.

BANKRUPTCY COURT FILES ORDER TO CONVERT PEQUENO TO CH13

On July 20, 2004, Bankruptcy court entered Order reflecting that Pequeno was converted to Chapter 13 pursuant to the District court ruling and that Pequeno had until July 23, 2004 to enter Ch13 plan. On July 23, 2004, Pequeno filed an updated Chapter 13 plan to lawfully pay for his assets which include his homestead, car, and unsecured creditors. The Ch13 plan included was a 100% plan to pay Pequeno's unsecured creditors.

On August 4, 2004, Bankruptcy court held hearing to argue Ch7 Trustee Schmidt's attempt to Reconvert Pequeno from a Ch13 to Ch7 based on wrongful issues, after deliberation for more than 1 hour, Bankruptcy court stated that it would take matters under advisement.

On September 13, 2004 Bankruptcy signed Order that was entered on September 23, 2004 as shown in docket, to deny Ch7 Trustee Schmidt's Motion to Cross Convert without prejudice for Ch7 Trustee Schmidt to re-file by October 7, 2004 in case that Pequeno's Ch13 case had not been confirmed by then.

Eventhough Pequeno had been harassed through court for more than 3 months successive by Ch7 Trustee Schmidt NOT Ch13 Trustee in spite of Pequeno being in a Ch13. Bankruptcy court felt that 2 weeks would be enough for Pequeno to confirm his Ch13 plan. Ch7 Trustee Schmidt was interfering with Pequeno's Ch13 confirmation and Bankruptcy court was allowing this to happen.

On July 2004, Ch13 Trustee Boudlouche was assigned as Ch13 Trustee and promptly scheduled 341 hearing for November 5, 2004. Pequeno was contacted via email by Ch13 Trustee's case manager to gather documents and declared documents under oath prior to attending 341 meeting.

On October 22, 2004, Ch7 Trustee Schmidt filed his 2nd Cross-Convert Motion against Pequeno's estate again with unfound misrepresentation facts

about Pequeno's Ch13 confirmation and again NOT Ch13 Trustee.

On November 5, 2004, Ch13 Trustee held 341 meeting with Pequeno and discussed Pequeno's requirements for confirmation, amending of the Ch13 plan, filing motion to object to Ch7 Trustee's attorney fees and making payments according to conversion date of latest plan not from the beginning of case which was more than 2 ½ years earlier and including 100% payment of creditors from Pequeno's Judgment.

On December 1, 2004, Bankruptcy Court held hearing for Ch7 Trustee Schmidt's 2nd Motion to Cross-convert Pequeno's case to Ch7 and Court heard and saw Pequeno's Exhibits that showed: that Pequeno had made significant progress toward Ch13 confirmation with Ch13 Trustee Boudloche, that Pequeno had filed 2nd amended Ch13 plan than included Ch13 Trustee Boudlouche recommendation from Ch13 341 meeting, that Pequeno had rightfully objected to Ch7 Trustee Schmidt's administrative expenses pursuant to Bankruptcy law and as recommended by Ch13 Trustee, that Pequeno had made interim payments into Ch13 plan as recommended by Ch13 Trustee, that Pequeno had apply all of Pequeno's non-exempt Judgment and that Pequeno had filed a 100% pay plan to pay all creditors.

On December 27, 2004, Bankruptcy Court ruled to grant Ch7 Trustee Schmidt's 2nd Motion to Cross-Convert contrary to Title 11 U.S.C. §1307 and contrary to the weight of the evidence described above.

This ruling is against 'integrity of justice' and goes contrary of what Bankruptcy law is supposed to be. Congress provided Bankruptcy to provide a 'relief and a fresh start' but instead Bankruptcy Court has chosen to abuse Bankruptcy law and used it as mechanism to harm Pequeno. The motive is that the arm of justice which in this case is Ch7 Trustee Schmidt will stop at no ends to wrongfully harm Pequeno's property and gain access to Pequeno's $400,000 judgment, as long as Bankruptcy Court will allow.

Because of this wrongful ruling, Pequeno now has more than 11 appeals pending in District Court and the 5th Circuit court of appeals.

On January, 2005, Pequeno timely appeal this wrongful Order and is now before the District Appellate Court.

On March, 2005, District Court ruled to dismiss Bankruptcy appeal for non-payment of appeal fees.

On May, 2005, Pequeno filed a notice of appeal to the 5th Circuit Court of appeals.

On June, 2005, Pequeno filed Motion to Reconsider, pursuant to FRCP §59(e).

On June 23, 2005, Pequeno filed Motion to dismiss his 5th Circuit appeal and notify District Court of 5th Circuit dismissal of appeal.

On July 15, 2005, District Court ruled that Court lack jurisdiction because Pequeno had filed notice of appeal at the 5th Circuit eventhough the docket for the District Court showed that Pequeno did not have an active appeal before the 5th Circuit and that Pequeno had timely filed Motion for Reconsideration pursuant to Fed. Rules of Appellate Procedure § 4(a)4(A) which toll the time to file a notice of appeal.

On August 15, 2005, Pequeno timely appealed District Court's ruling of July 15, 2005.

SUMMARY AND REASONS FOR WRIT

Juan Pequeno, ('Pequeno') petitioner hereby petition this Court for issuance of a writ of certiorari to review the Order of the United States Court of Appeals for the Fifth Circuit entered in this proceeding, #05-41624 on August 31, 2006 to dismiss appeal and Order to deny re-hearing of same on October 12, 2006.

The 5th Circuit Court Appeals dismissed Pequeno's appeal of #05-41624 eventhough Pequeno is a Ch13 debtor appellant. Pequeno briefed the issue that Pequeno had timely appealed the Bankruptcy Court order to reconvert to Chapter 7 in violation on new bankruptcy law since Pequeno qualified under new Ch13 Bankruptcy law.

The new Bankruptcy Law which went into effect about October 2005 states in essence that a Bankruptcy debtor who is employed and earning wages should be in a Ch13.

On March 4, 2005, the 5th Circuit Court of Appeals opinion in cause#04-40573 affirmed Pequeno's right to convert from a Ch7 to a Ch13. Ch13 Trustee Boudlouche was satisfied with Pequeno's progress towards Ch13 confirmation since Pequeno had filed a 100% Ch13 pay plan which included Pequeno's Judgment, and Pequeno had made 5 months' payments.

Ch7 Trustee Michael Schmidt in bad faith interfered with Pequeno's Ch13 confirmation by presenting false information to Bankruptcy Court in order to get an Order to reconvert Pequeno back to a Ch7 so that Ch7 Trustee Schmidt could try to control Pequeno's Judgment.

Pequeno timely appealed the Bankruptcy Order to reconvert; and briefs have been filed in the 5th Circuit Court of Appeals case#05-41309.

On March 4, 2005, in the same 5th Circuit Court of Appeals opinion, cause #04-40573 mentioned above, the 5th Circuit stated, in reference to a conditional settlement which Ch7 Trustee Schmidt sought to control by keeping Pequeno in a Ch7:

Quote from 5th Circuit, cause#04-40573, opinion of March 4, 2005, page 7:

"On September 25, 2002, Bankruptcy Court approved the settlement subject to a final ruling on Pequeno's motion to convert".

Subnote:#7, from same opinion, page 7:

"Such a conditional ruling was necessary because if the Bankruptcy Court determined that Pequeno should be allowed to convert to Ch13, then as debtor-in-possession, he, and not Schmidt, would have the right to make any settlement decisions."

Pursuant Bankruptcy law 11 U.S.C. § 323(b) Pequeno as a Ch13 debtor-in-possession appellant, is granted the right to appeal court decisions which affect debtor's estate.

Quote from 11 U.S.C § 323(b):

"Subsection (b) grants the trustee the capacity to sue and to be sued. If the debtor remains in possession in a Chapter 11 case, section 1107 gives the debtor- in-possession these rights of the trustee: the debtor-in-possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13Case."

On October 2005, Ch7 Trustee Schmidt filed joint motion with other Appellees Seeking Order from District Court, cause #B00cv180, to 'modify Pequeno's Judgment'. Pequeno's original Judgment of $400,000 plus attorney fees was modified to $140,000.

On November 3, 2005, District Judge Hilda Tagle (1). entered Order granting 'modification'. In same case, Honorable Judge Tagle (2). also ordered that one of the Appellees, Law Office of Frank Costilla, had signed the joint motion, eventhough Costilla had been dismissed by Pequeno on September 9, 2002 (more that 3 years earlier). (3) In the same case, Honorable Judge Tagle ruled that Pequeno was party of interest and could proceed pro-se in appeal.

On January 2006, Pequeno timely filed amended notice of appeal to 5th Circuit of Appeals.

On August 31, 2006, 5th Circuit ordered to dismiss appeal, based on Defendants' motion to dismiss which alleged that Pequeno lacked standing to appeal.

On October 12, 2006, 5th Circuit ordered to deny Pequeno's reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10th, 2007

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41624

JUAN PEQUENO
Plaintiff – Appellant

v.

CITY OF BROWNSVILLE TEXAS; MAYOR OF BROWNSVILLE BLANCA VELA;CITY COMMISSIONER CARLTON;CITY COMMISSIONER ERNIE HERNANDEZ; HENRY MCNAIR, JR; CITY COMMISSIONER JOHN WOOD; ASSISTANT CITY MANAGER IVAN WELKER; HUMAN RESOURCES DIRECTOR EFREN HERNANDEZ; PREVIOUS MAYOR HENRY GONZALES; PREVIOUS CITY MANAGER CARLOS RUBENSTEIN
Defendants – Appellees

and
MICHAEL B SCHMIDT,
Trustee – Appellee

and
FRANK COSTILLA,
Appellee

Appeals from the United States District Court for the Southern District of Texas, Brownsville

Before DeMoss, Stewart and Prado, Circuit Judges.

PER CURIAM:

This panel previously granted Appellee's motion to dismiss appeal. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that motion is DENIED

s/ DeMoss, Stewart, Prado

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41624

JUAN PEQUENO
Plaintiff – Appellant

v.

CITY OF BROWNSVILLE TEXAS; MAYOR OF BROWNSVILLE BLANCA VELA;CITY COMMISSIONER CARLTON;CITY COMMISSIONER ERNIE HERNANDEZ; HENRY MCNAIR, JR; CITY COMMISSIONER JOHN WOOD; ASSISTANT CITY MANAGER IVAN WELKER; HUMAN RESOURCES DIRECTOR EFREN HERNANDEZ; PREVIOUS MAYOR HENRY GONZALES; PREVIOUS CITY MANAGER CARLOS RUBENSTEIN
Defendants – Appellees

and
MICHAEL B SCHMIDT,
Trustee – Appellee

and
FRANK COSTILLA,
Appellee

Appeals from the United States District Court for the Southern District of Texas, Brownsville

Before DeMoss, Stewart and Prado, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the appellees' motion to dismiss appeals is GRANTED.

IT IS FURTHER ORDERED that the appellees' alternative motion for an extension of time to file brief is DISMISSED AS MOOT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Juan Pequeno,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO
	§	B-00-cv-180
v.	§	
	§	
City of Brownsville, et al.,	§	
	§	
Defendants,	§	

ORDER

BE IT REMEMBERED, that on February 21, 2006 the Court GRANTED the Plaintiff's motion to proceed pro se in this case. The Court ORDERS the District Clerk to record the Plaintiff's dismissal of attorney Frank Costilla as of September 9, 2002 in the docket.

DONE at Brownsville, Texas, this 21st day of February 2006.

/s/ Hilda Tagle
Hilda G. Tagle
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Juan Pequeno,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	B-00-cv-180
v.	§	
	§	
City of Brownsville, et al.,	§	
	§	
Defendants,	§	

ORDER & OPINION

BE IT REMEMBERED, that on December 15, 2005, the Court GRANTED Plaintiff's Motion to Reconsider Order Dismissing Plaintiff's Motion to Amend This Court's Order of November 3, 2005 and to Impose Sanctions for Misleading the Court on Plaintiff Pequeno's Lawsuit [Dkt. No. 119]. After consideration under Rule 59(e), the Court DENIED Plaintiff's Motion to Amend [Dkt. No. 117].

Motion to Alter or Amend Judgment Under Rule 59(e)

Pursuant to Rule 59(e), the Court may consider a motion to alter or amend judgment if it is filed in a timely manner. Fed. R. Civ. P. 59(e). Rule 59(e)

affords the Court considerable discretion in balancing the need for finality with the need for justice. *See Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 355 (5th Circ. 1993).* A motion for reconsideration may be granted to correct an error of law. *Fields v. Pool Offshore, Inc., 1998 WL 43217 *2(E.D. La Feb. 3, 1998).*

Factual and Procedural Background

Plaintiff Juan Pequeno filed this suit ("the employment case") on November 27, 2000, after his termination from employment with the City of Brownsville, alleging that his rights under the First and Fourteenth Amendments to the United States Constitution were violated, and sought damages pursuant to 42 U.S.C. & 1983. At the close of trial, the jury returned a verdict in his favor on February 15, 2002. The Court entered final judgment in this case on March 26, 2002 [Dkt. No. 89], and the case was appealed on April 15, 2002 [Dkt. No. 97].

During the course of this case, Plaintiff filed for bankruptcy under chapter 7 ("the bankruptcy case"). The protracted proceedings have included multiple appeals by the Plaintiff. The factual and procedural history of this case is discussed in full in Pequeno v. Schmidt. 307 B.R. 568, 570-574 (S.D. Tex 2004). Two actions taken by the bankruptcy court during the course of the chapter 7 proceedings are the subject of this motion to amend. First, the bankruptcy judge appointed Michael Schmidt as the Chapter 7 trustee and recognized the trustee's authority to mediate the judgment from the employment case. Second, the bankruptcy court approved the settlement agreement reached by the trustee with the defendants from the

earlier suit during mediation. Plaintiff contests these two events despite clear orders from the bankruptcy court that both orders are final and that Pequeno waived any appeal of these matters [Bankr.Case No. 01-24255, Dkt. No. 365].

On November 3, 2005, this Court granted a Joint Motion for Entry of Agreed Modified Final Judgment submitted by the bankruptcy trustee and the Defendants in the original employment action in recognition of the settlement reached in September 2002. Plaintiff filed a Notice of Appeal [Dkt. No. 118], the Court now reconsiders this motion in light of Federal Rule of Appellate Procedure 4(a).

Timing of Appeal and Pending Motions in the District Court

General, either the district court or the appeals court has jurisdiction at any particular time. However, despite the filing of a notice of appeal, some motions may still be considered by the district court. Federal Rules of Appellate Procedure 4(a)(4)(A)-(B). Rule 4(a)(4) permits the notice of appeal to become effective after the district court disposes of specified types of motions including a motion to alter or amend the judgment under Rule 59. Although Plaintiff filed a notice of appeal prior to filing the motion to amend, the Court erred in dismissing this motion for lack of jurisdiction rather than disposing of the motion as permitted by Rule 4(a)(4). Therefore, the Court now considers this Rule 59 motion again.

Plaintiff's Request to Amend

In Plaintiff's Motion to Amend this Court's Order of November 3, 2005 [Dkt. No. 117], Plaintiff contends that Trustee Schmidt lacked authority to mediate the judgment from the employment case. Additionally, Plaintiff contends that Trustee Schmidt is not a proper party in interest due to the conversion of Pequeno's bankruptcy action to Chapter 13 from Chapter 7.

In the Bankruptcy Court for the Southern District of Texas, the Court authorized Trustee Schmidt to mediated and settle the judgment from the employment case. Pequeno objected to this authorization, but the Court denied the Debtor's Motion to Object and to Revoke Order Authorizing Trustee to Mediate and Settle [Bankr. Case No. 01-24255-B-7, Dkt. No. 120] on November 12, 2002. After the settlement was reached, the bankruptcy court approved the settlement agreement. Pequeno moved the court to revoke the order approving of the settlement, but the court denied this motion as well on the same date [Bank. Case No. 01-24255-b-7, Dkt. No. 119]. Pequeno revisited these issues before the bankruptcy court in September 2005. The bankruptcy court denied Pequeno's Motion to Null and Void Chapter 7 Trustee Michael Schmidt's Settlement of September 16, 2002 [Bankr. Case No. 01-24255, Dkt. No. 365].

In its order of September 26, 2005, the Bankruptcy Court for the Southern District of Texas explicitly rejected the notion that Trustee Schmidt lacked authority to enter into a settlement of the judgment in the employment case. Additionally, the bankruptcy court denied the motion to vacate the order approving the settlement. Despite the fact that Pequeno's bankruptcy case was later converted from Chapter 7 to Chapter 13, at the time of the settlement, Pequeno remained in Chapter 7 and Schmidt possessed authority as the Chapter 7 trustee to mediate and settle on behalf of the estate. The bankruptcy court indicated that Pequeno did not appeal either of the November 12, 2002 orders reiterating the bankruptcy court's position on Trustee Schmidt's authority and the approved settlement and therefore, these orders are final.

Based on these facts, Trustee Schmidt was the authorized party to mediate and settle the judgment in the employment case and the settlement was approved by the bankruptcy court after the parties reached this agreement. Therefore, Trustee Schmidt and the Defendants from the employment case were the proper parties to file a motion with this Court to modify the final judgment. Therefore, the Court DENIES the Plaintiff's Motion to Amend [Dkt. No. 117].

Conclusion

Therefore, the Court GRANTED Plaintiff's Motion to Reconsider Order Dismissing Plaintiff's Motion to Amend This Court's Order of November 3, 2005 and to Impose Sanctions for Misleading the Court on Plaintiff's Pequeno's Lawsuit [Dkt. No. 119]. After reconsideration under Rule 59(e), the Court DENIED Plaintiff's Motion to Amend [Dkt. No. 117].

DONE at Brownsville, Texas, this 15th day of December 2005.

/s/ Hilda Tagle
Hilda G. Tagle
United States District Judge